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In The

Supreme Court of the United States

October Term, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

INTRODUCTION

Based on this Court's guidelines in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), the issue at bar is whether Congress intended, in the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, *et seq.* ("ADEA"), that preclusive effect be given to judicially unreviewed fact-findings of a state

administrative agency. *Elliott*, 478 U.S. at 797; *Stillians v State of Iowa*, 843 F.2d 276 at 281 (8th Cir. 1988).

Respondent does not dispute that the doctrine of common law administrative preclusion is sufficiently established in the federal courts. Nor does Respondent dispute that the principles enunciated in this Court's decision in *Elliott* control by requiring a showing of Congressional intent to overcome the presumption of administrative preclusion. Respondent respectfully submits however, that the ADEA does reflect a clear Congressional intent to contravene that presumption.

SUMMARY OF ARGUMENT

While, in *Elliott*, this Court found, on the face of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* ("Title VII"), no explicit indication that Congress intended to reject agency preclusion, it nevertheless concluded that it would be incongruous for a federal court to give preclusive weight to unreviewed state agency fact-findings addressing the same claims. This Court reasoned that under Title VII, 42 U.S.C. §2000e-5(b), the EEOC is required to accord "substantial weight" to the state agency's findings of fact. Because a provision providing that the EEOC give "substantial weight" to unreviewed state agency fact-findings is necessarily inconsistent with a federal court according such fact-findings preclusive effect, this Court had no difficulty in concluding that Congress could not have intended for unreviewed state agency findings to have preclusive effect on subsequent federal actions brought under Title VII.

The mere absence of a "substantial weight" provision in the ADEA, an anti-discrimination statute modelled after Title VII, does not, however, support the inference that Congress intended agency preclusion to apply to actions brought under the ADEA. As

discussed *infra*, there is nothing comparable to this Title VII provision in the ADEA since, under the ADEA, the EEOC has no fact-finding powers of its own which parallel those given to state agencies under state anti-discrimination laws. Hence, the question of what weight, if any, the EEOC should give - in an adjudication - to the unreviewed fact-findings of a state agency in an ADEA case simply never arises.

Although no explicit language regarding the extent of EEOC deference to unreviewed state agency findings is found in the ADEA, there are other clear indications in the ADEA that Congress intended to reject state agency preclusion. These indications can be gleaned from the approach followed by the Seventh Circuit in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987), and by the Second Circuit in the case at bar, 901 F.2d 1148 (2nd Cir. 1990), i.e., comparing, in side-by-side fashion, the applicable agency deferral provisions in Title VII with those in the ADEA. This approach is consistent with the type of analysis adopted by this Court in *Elliott*. A side-by-side comparison of the two anti-discrimination statutes will demonstrate, in a logical and common sense manner, Congressional intent.

The provisions in the ADEA relating to federal-state relations evince a Congressional inclination to promote federal judicial action and, hence, to downplay the importance of state agency activities. Section 14(a) of the ADEA provides for instant judicial supersedure of all state actions upon commencement of a federal suit. In the case of a rapid termination of the state agency's processing, including the issuing of fact-findings adverse to a grievant, Section 14(b) provides for accelerated access to federal court, not agency preclusion. Similar language regarding accelerated state agency processing is found in Section 7(d)(2). In view of the legislative history leading to the addition of the "substantial weight" provision in Title VII, the

absence of such provision in the ADEA suggests that little or *no* weight, rather than substantial weight, should be accorded state agency findings.

Common sense also favors agency non-preclusion in the ADEA. A contrary result would give the state agency's processing a greater judicial impact than that of the EEOC, even though the federal agency may be presumed to have greater expertise in the area. Furthermore, a state agency filing is a jurisdictional prerequisite to federal court suit. Since there is no way to avoid the filing, agency preclusion resulting therefrom would be unfair. Moreover, there are no procedures in the ADEA for a grievant to opt-out of agency processing or determine its course.

Public policy also disfavors putting the state agency in the polar position of being either the main litigation arena or a minefield to be avoided. Either extreme undermines the efficacy of the state agency as a device for resolving claims to the satisfaction of the grievant.

An examination of the text of the ADEA, together with that of Title VII, legislative history, public policy considerations and principles of common sense, provides a more sensible approach than that followed by the Eighth Circuit in *Stillians*. There, the Court declined to make any side-by-side comparison between ADEA and Title VII, but instead started out with the presumption of a federal common law favoring agency preclusion and thereafter sought a facially expressed Congressional intent in the ADEA to rebut that presumption. As we show *infra*, the *Stillians* approach is mechanistic and ignores the broader purpose of the ADEA. To suggest that administrative preclusion must apply to the ADEA, unless the statute itself facially provides for some lesser weight to be attached to state agency findings, frames the inquiry in a way that effectively predetermines its outcome. *Elliott* holds that agency

preclusion will apply unless a contrary Congressional *intent* can be found; *Elliott* does not say that the ADEA must facially address, and then explicitly reject, agency preclusion.

• • •

Petitioner has liberally peppered its Brief with assertions that Respondent has had his day in court by receiving a full-dress hearing before the New York State Division of Human Rights ("DHR"): Petitioner states that Respondent received "a hearing that satisfied the constitutional requirements of due process" (Pet.B. at 7)[1]; that he "vigorously pursued *formal* administrative remedies... [and]... insisted upon and participated in adversarial litigation." (Pet.B. at 17); that the DHR hearing "demanded by and granted to Mr. Solimino far exceeded the brief, informal settlement efforts..." (Pet.B. at 17); that Respondent "elected to vigorously litigate his claims" (Pet.B. at 20); that "he elected to entrust his matter to the DHR" (Pet.B. at 26); and that the DHR "acted in a judicial or quasi-judicial capacity in determining that Solimino's complaint was groundless" (Pet.B. at 28). Petitioner even devotes Point II of its Brief to the claim that the DHR procedures at bar "satisfied the due process clause" (Pet.B. at 27).

Respondent respectfully objects to each of these various assertions because they have no place in this appeal. They are irrelevant to, as well as unsupported by, the record herein. Moreover, Respondent appealed precisely this issue to the Second Circuit. Only in a footnote does Petitioner correctly acknowledge that the Second Circuit did not reach the issue of whether the DHR proceedings below had satisfied due process so as to bind the District Court

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[1] References to Petitioner's Brief are cited as ("Pet.B. at ___").

(Pet.B. at 7, n. 6). The *sole* question addressed to the Second Circuit, and thus presented on this appeal, is whether or not that Court was correct in holding that state agency preclusion should not apply to unreviewed agency findings so as to bar a subsequent action under ADEA. *See* Rule 24.1(a) of the Rules of this Court. Accordingly, this Court should disregard and not consider any matters relative to the adequacy of the hearing or the sufficiency of the due process allegedly received by Respondent before the DHR. *Cf. Elliott*, 478 U.S. at 799, n. 8.

For the reasons summarized above and to be discussed herein, Respondent urges this Court to adopt the well-reasoned decisions of the unanimous panels of the Seventh Circuit in *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987), the Fourth Circuit in *Rosenfeld v. Dept. of the Army*, 769 F.2d 237 (4th Cir. 1985), the Second Circuit in the case at bar, 901 F.2d 1148 (2nd Cir. 1990), and the pointed dissent of the Eighth Circuit in *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988).

ARGUMENT

POINT I

THE APPLICABLE LEGISLATIVE HISTORY INDICATES AN INTENT BY CONGRESS TO FAVOR THE BRINGING OF A PRIVATE ADEA ACTION

While there do not appear to be any unequivocal assertions in the ADEA's legislature history as to Congressional intent on the question of state agency preclusion, there are nonetheless several strong indications to suggest that judicially unreviewed fact-findings at the state agency level were never intended to have preclusive effect.

First, Congress passed the ADEA in 1967, within three (3) years after the passage of Title VII in 1964, a closely analogous anti-discrimination statute upon which the ADEA was modelled in many respects. *See, Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); the case at bar, 901 F.2d 1148 (2nd Cir. 1990); and *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 at 1568 (2nd Cir. 1989), which states:

> Our interpretations of the ADEA rely heavily on decisions arising under Title VII... "for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" (Citing *Thurston* and *Lorillard*.)

In *Elliott*, this Court found that Congress had indeed departed from the previous presumption of common law agency preclusion when it enacted Title VII. It is difficult to attribute an intent by Congress to make an about-face in the ADEA and revert back to common law agency preclusion. If Congress had intended in the ADEA to contravene the emerging trend of no agency preclusion, as reflected in Title VII, presumably it would have heralded such flip-flop intentions in a more befitting manner than complete silence.

Second, if any other emerging Congressional trend is indicated between the dates of passage of Title VII in 1964 and the ADEA in 1967, it is toward *decreased* reliance on state agency processing procedures. For instance, instead of the 180 or 300-day deferral period required for state and federal agency processing before commencing a private suit under Title VII, 42 U.S.C. §2000e-5(f)(1), the ADEA requires a mere 60-day deferral period. 29 U.S.C. §633(b). Unlike Title VII, 42 U.S.C. §2000e-5(c), the ADEA does not provide an *exclusive* 60-day period for state agency processing. Moreover, while Title VII requires that the EEOC defer its processing to the state agency for sixty (60) days, the ADEA does

not require *sequential* agency processing; it allows *concurrent* processing by the EEOC and by any state agency, thereby allowing the entire agency processing phase to be completed that much sooner. 29 U.S.C. 633(b). While Title VII requires that a grievant obtain a notice of right to sue letter from the EEOC before commencing suit, the ADEA imposes no such "visa" procurement requirement, as a jurisdictional prerequisite to suit, on a grievant seeking access to the federal courts. 42 U.S.C. §20003-5(f)(1).

The ADEA favors private actions more than does Title VII. Unlike Title VII, the ADEA allows grievants to recover double or liquidated damages. 29 U.S.C. §216(b) and §626(b). The availability of such a remedy in the ADEA strongly suggests that Congress wanted to provide *more* incentives than those available under Title VII in order to encourage the filing of private suits rather than the administrative processing of complaints. The statutory amendments to the ADEA in 1978, confirming the availability of a jury trial, 29 U.S.C. §626(c)(2) - a right which remains unclear for actions under Title VII - is yet another indication that Congress intended to give greater encouragement to the bringing of private suits under the ADEA.

Given this bounty of incentives for private suit, it is not likely that Congress contemplated state agency processing as an attractive or effective enforcement alternative to private action under the ADEA. To endow state agency fact-findings with preclusive effect in age discrimination matters would run precisely *counter* to several provisions clearly seeking to encourage judicial suits under the ADEA.

POINT II

REFERENCES IN THE ADEA INDICATE THAT LITTLE OR NO WEIGHT SHOULD BE ACCORDED TO STATE AGENCY FACT-FINDINGS

The various references in the ADEA to state agency proceedings do not reflect that *any* substantive weight, let alone preclusive effect, should be attached to such proceedings in any subsequent judicial proceeding brought under the ADEA.

A. SECTION 14(a):

Under Section 14(a) of the ADEA, 29 U.S.C. §633(a), any state action is instantly "superseded" once a private federal suit under ADEA is commenced.[2] This section provides:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

At the very least, "supersede" means that all such agency proceedings are stayed, if not permanently dismissed.[3]

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2 Petitioner's suggestion (Pet.B. at 19), that this Section is designed only to limit *state court* law suits is belied by the words "state action" which include all proceedings, judicial and administrative, and by the word "agency" at the start of the Section.

3 "Supersede" means "Obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal." *Black's Law Dictionary* 1607 Rev. 4th Ed. 1970. (Citing *City of Los Angeles v. Gurdane*, 59 F.2d 161, 163 (9th Cir. 1932).)

If Congress had remotely intended state agency findings to be given substantial, let alone preclusive, weight by a federal court in an ADEA action, it presumably would have granted the EEOC and the applicable state agency more than a scant 60-day deferral period to perform their respective processing functions before instant supersedure would apply. Since under Section 14(a) an EEOC or state agency proceeding may be abandoned by a grievant, after a mere sixty (60) day deferral period, regardless of the stage of the agency investigation, it is difficult to believe that Congress intended to attach much importance to such agency endeavors. To the extent the ADEA contemplates instant supersedure, the importance of interim agency proceedings is diminished.

Petitioner has also suggested, (Pet.B. at 20), that Section 14(a) has no relevance to *completed* state agency proceedings—only to ongoing proceedings.[4] The fact that Section 14(a) cuts off *pending* state proceedings does not mean that it should have no impact upon *completed* proceedings. If Section 14(a) of the ADEA provides the triggering mechanism, i.e., a federal action under ADEA, for superseding a pending state agency proceeding, even before a fact-finding determination is reached, it defies logic to hold that the same state agency proceeding can, in circular fashion, supersede said federal action.

B. SECTION 14(b):

The language of Section 14(b) of the ADEA, 29 U.S.C. §633(b), further confirms the relative non-importance of state agency actions. This Section provides that if a state agency should terminate its

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[4] By this argument, Petitioner appears to concede that this Section does, in fact, apply to state agency proceedings, not merely to state court actions.

processing of a grievant's claim before the 60-day deferral period ends, there is no bar to federal action but, rather, a *pro tanto* acceleration of the deferral period, thereby allowing a federal ADEA suit to be commenced by a grievant that much sooner. This Section provides:

> ... no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

See Oscar Mayer & Co. v. Evans, 441 U.S. 750 at 759 (1979).

When a state agency terminates its processing prior to the expiration of sixty (60) days, it invariably does so because it has made fact-findings manifesting no basis for the employee's claim, not fact-findings which show that the employer violated the law. In allowing for a shortening of the deferral period upon a rapid termination of the state agency proceedings, Congress had in mind the situation where the employee, *not* the employer, does not prevail before the state agency.[5] Thus, the cases most likely to fall into the category of quick termination will be those of "no probable cause." *Id.* The fact that, even in such seemingly "open and shut" cases against a grievant, Congress contemplated that he or she might still

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[5] For example, under the New York State Human Rights Law ("HRL"), Sections 297.2 to 297.4, it is virtually impossible for an employer to receive *(continued)* a final adverse fact-finding decision within 60 days. At most, in that time frame, after a preliminary investigation, there can be a *non*-judicial finding of "probable cause" adverse to the employer. The employer then remains free to dispute that preliminary finding in a "public hearing" where factual issues are adjudicated by an administrative law judge. (See Point III[D], *infra*.)

be able to bring a federal suit under the ADEA, (and even sooner), rather than face agency preclusion, is compelling evidence that Congress could not have intended for such judicially unreviewed state agency fact-findings to have preclusive effect.

C. SECTION 7(d)(2):

A similar acceleration procedure to that in Section 14(b) appears in Section 7(d)(2), 29 U.S.C. §626(d)(2). This provision requires that a charge be filed ith the EEOC:

> "... within 300 days after the alleged unlawful practice occurred, or within 30 days after... notice of termination of proceedings under State law, whichever is earlier."

Here, again, if Congress had intended the fact-findings of the state agency to receive preclusive effect, there would have been no purpose in mandating any subsequent filing by the grievant with the EEOC. If a federal court would be bound by the adverse state agency fact-findings in any event, a filing with the EEOC would be superfluous since, *a fortiori*, that agency would similarly be bound.

In contrast to these textual instances suggesting no agency preclusion, there appears no language, procedural mechanism or other indicia anywhere in the ADEA or in its legislative history suggesting a Congressional intention to effect agency preclusion.

D. THE ABSENCE OF A "SUBSTANTIAL WEIGHT" PROVISION:

Petitioner notes that the ADEA lacks a "substantial weight" provision similar to that found in Title VII and argues that this ommission provides a basis for finding agency preclusion. (Pet.B. at 15.) Petitioner's argument, however, supports Respondent's

position. Under the ADEA, rather than have the EEOC bound by the state agency's findings, the legislative history strongly suggest that the EEOC is free to give *less* or even *no* weight at all to unreviewed state agency fact determinations.

In 1972, Congress added a "substantial weight" provision to Title VII in order to increase the EEOC's deference to state agency fact-findings. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 at 474-75 and n. 16 (1979). Prior to the 1972 amendments, the EEOC had been free in a Title VII case to ignore state agency findings and accord them no weight at all. *Id.* at 470-71, n. 8; *Duggan*, 818 F.2d at 1297. Since no similar "substantial weight" provision was added to the ADEA, the only logical conclusion is that the EEOC remains free, when processing a claim under ADEA, to continue to accord no weight at all to any state agency determinations. If the EEOC is free to give little or no weight to state fact-findings, a federal court should not logically be obliged to give such findings preclusive effect.

E. THE ABSENCE OF ANY WARNING:

There is no warning in the ADEA to grievants, despite the fact that state agency proceedings may be abruptly discontinued or stayed by the commencement of an ADEA suit, that any state agency findings issued before the federal suit is brought will nonetheless be given preclusive effect.[6] Considering the dire consequences of such a result in a statute that is plainly remedial in nature, the absence of a warning is incongruous.

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[6] Similarly, there is no indication in the record below that Respondent at bar received any notice or other suggestion from the DHR that any proceeding in which he participated would be given preclusive effect.

* * *

In sum, the policies of instant judicial supersedure of all state actions and accelerated access to federal court before state agency findings are made, although not logically exclusive of automatic agency preclusion after fact-findings are made, are nonetheless fairly incompatible with agency preclusion. The absence of any mention in the ADEA of this incompatibility suggests that Congress itself perceived no possibility of agency preclusion and, hence, saw no need to reconcile it with other ADEA provisions. Finally, since the purpose of the 1972 "substantial weight" amendment to Title VII was to increase the EEOC's deference to state agency findings (where previously there had been no deference at all), the failure of Congress to add a similar "substantial weight" amendment to the ADEA shows that Congress wanted *less* deference by the EEOC and, by logical extension, the federal courts, to apply to state agency findings in ADEA cases.

POINT III

STATE AGENCY NON-PRECLUSION IS WARRANTED UNDER PRINCIPLES OF FAIRNESS AND LOGIC

A. UNDER STATE AGENCY PRECLUSION, THE EEOC'S GREATER EXPERTISE WOULD BE IGNORED:

The ADEA mandates, in Sections 7(d) and 14(b), that, prior to institution of a private federal action, an employee file a charge of age discrimination with both the EEOC and the state agency and wait a minimum of 60 days thereafter before bringing suit. During that waiting period, the EEOC can, on a concurrent basis with the state agency, investigate the charges or institute an action based thereon, but it *cannot* adjudicate the claim and/or make fact-findings. State agencies, however, depending upon the state statute under which they are empowered to act, can both investigate

and issue fact-findings. See, for example, Sections 297.2 to 297.4 of the HRL.

When Congress enacted the ADEA in 1967, it was doubtless aware of the dual investigation/adjudication capacity of certain state agencies. Congress also knew that the Department of Labor, the federal agency then charged with responsibility for enforcing the ADEA, would soon, through experience, develop professional expertise in investigating and resolving age discrimination complaints. If Congress wanted state agency findings to have preclusive effect under ADEA, presumably it would have given comparable fact-finding powers to the federal agency, if not according preclusive effect to such findings. The omission suggests that unreviewed fact-findings of a state agency were not intended to have a greater impact on federal ADEA actions than those of the federal agency responsible

for enforcing the ADEA.[7] Yet, if the parallel state agency were to exercise both its investigatory and adjudicatory powers, and if its fact-findings were then given preclusive effect, EEOC processing would be rendered nugatory. *Duggan*, 818 F.2d at 1295; *Kremer*, 456 U.S. 461, 470, n. 7.

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7 This is not to say that state agency fact-findings serve no purpose in the ADEA. Such findings may be given weight, in a federal ADEA suit, on a discretionary basis, depending upon who conducted the investigation, the degree of procedural fairness, the extent and nature of the fact-finding procedures, the adequacy of the record, the reliability of the findings, the extent of the credibility issues, etc. *Cf., Whatley v. Skaggs Cos.*, 707 F.2d 1129 (10th Cir. 1983), *cert. den.*, 464 U.S. 938, with *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924 (7th Cir. 1984). *See* also *Alexander v. Gardner-Denver*, 415 U.S. 36 at 60, n.21 (1976).

B. THE STATE AGENCY FILING IS MANDATORY:

There is another logical reason why Congress could not have intended state agency preclusion. A grievant has *no* discretion to forego completely state remedies in favor of a federal lawsuit. Under *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 at 756 (1979), a grievant is required, by Section 14(b) of the ADEA, as a jurisdictional perquisite to federal suit, to make an initial filing with the applicable state agency. Since that pre-suit filing requirement cannot be bypassed, a grievant intent on bringing a suit under the ADEA would be obliged to have his private federal suit ready for filing on the 61st day to minimize the possibility of preclusion. On the other hand, a grievant may not be desirous of abandoning all state agency processing after only 60 days. The threat of agency preclusion would force the grievant to make up his mind about the desirability of private litigation at a premature stage in the proceedings. Because this would deprive the grievant of any meaningful opportunity to weigh the merits of his case at the state agency level, before plunging into a federal court suit, the assertion by Petitioner that the grievant should have to "live with his decision", (Pet.B at 22, citing *Stillians*, 843 F.2d at 282), is unwarranted.

The very shortness of the state agency deferral period does not ameliorate the problem. Although it is unlikely that a 60-day turn-around period provides adequate time in which a complete investigation and fact-findings could be made, a grievant still remains at some risk, in this period, of incurring an adverse agency fact-finding. Believing that his case is progressing to a conclusion, or not yet being able to incur legal expenses in a court suit, a grievant may wish to grant the state agency some additional time, beyond 60 days, to further investigate and possibly resolve the matter. (See Point III [C], *infra*, however, regarding a grievant's general inability to monitor the agency's actions.) Because of his exposure to

possible adverse fact-findings, the grievant is placed in a quandary whether to allow the state agency more time to resolve the matter, or else to proceed to federal court, thereby preempting further state processing. Where a grievant wants only to give the state agency a fair opportunity to pursue conciliation activities, for whatever reason, he should not be penalized because the state agency has proceeded beyond his expectations and issued fact-findings against him.

C. THE GRIEVANT CANNOT ANTICIPATE OR DETERMINE THE STATE AGENCY'S ACTIONS:

Petitioner notes that Section 7(d) provides for a brief 60-day period because it was expected that the EEOC would merely attempt to mediate the grievance in this period. (Pet.B. at 21.) But the 60-day deferral period equally applies to all state agency processing under Section 14(b). It is anomalous that Congress would have limited the EEOC to 60 days to conduct mediation activities, while at the same time believing that the state agency could reasonably accomplish more than mediation activities in this limited time period.

This suggests another reason to doubt that Congress intended the state agency's role to be significant in this 60-day period. If Congress had intended for the state agency to do more than conciliate, it presumably would have given grievants a means to opt-out of such agency processing if it was not proceeding as expected. Yet, the ADEA is silent about what procedures, if any, a grievant can take, once he has made the mandatory filing, if he does not want the state agency to investigate in depth or to make fact-findings prior to the expiration of the deferral period.[8]

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[8] Under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), the only

The assertion by Petitioner, that an ADEA claimant has the "ability... to insist that the... state authority proceeding be limited to exploring of the possibility of conciliation or settlement:" (Pet.B. at 23-24), is unfathomable.[9] Surely, neither the HRL nor the Rules of Practice of the DHR provide a procedure for a grievant to instruct the DHR *not* to investigate or make fact-findings. Petitioner's alternate suggestion, that agency preclusion is "appropriate" when the claimant "chooses to participate fully" (Pet.B. at 24), begs the question. If the claimant elects to participate less than fully, in the hope of avoiding preclusion, even to the extent of not cooperating or of defaulting, he would only increase the chances of an earlier adverse fact-finding—not decrease the chances of agency preclusion.

Finally, even if a grievant could somehow request the state agency to conduct only limited processing, he would have no way to verify if his request was being honored. State agency investigations are not necessarily conducted in close consultation with the grievant. Given the state agency filing requirement imposed on a grievant by Section 7(d), unaccompanied by any corresponding method within the deferral period to opt-out, to participate less than fully, or to monitor the agency's course of action once the filing is made, it seems questionable whether Congress intended state agencies to pursue more than preliminary investigation and conciliation in the limited time allotted.

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way that a state agency fact-finding would be given preclusive effect would be if the parties sought judicial review in a state court. As discussed in Point IV(B)(1), *infra*, *Kremer* establishes a "bright line" for either avoiding the preclusive effect of a state agency finding or providing a means to evoke agency preclusion if desired.

9 Petitioner's citation to *Oscar Mayer*, 441 U.S. at 761, is inapposite.

D. CERTAIN STATE AGENCY PROCEDURES PROVIDE A DOUBLE ADJUDICATORY OPPORTUNITY FOR THE EMPLOYER:

As noted in Point II(B) (n. 5), the procedures of certain state agencies are designed to give the employer, in effect, two (2) bites of the apple. For example, under Section 297.2 of the HRL, a preliminary finding of "no probable cause" at the investigative or pre-hearing stage against the grievant, such as occurred at bar, terminates all further agency proceedings. On the other hand, a preliminary finding of "probable cause" against the employer does not terminate all further proceedings; it merely results in setting down the matter for further proceedings by the state agency, including the holding of a public hearing, at which formal fact-findings are made. *See* Section 297.4(a) of the HRL. Since no adjudication against the employer can ever occur until after the completion of the public hearing, only the employee is at risk in the early stages of an agency investigation of an adverse determination.

The asymmetry resulting from the fact that certain state agency proceedings can yield a result adverse to the employee in the agency deferral period, but not to the employer until after a public hearing, creates a situation where wide, and sometimes inequitable, variations in state agency processing will determine whether or not an ADEA action can be brought. Such a haphazard state of affairs raises a further doubt that Congress contemplated preclusive effect would be given to state agency proceedings.

E. THE STILLIANS APPROACH DOES NOT ADMIT OF LOGIC OR COMMON SENSE CONSIDERATIONS:

The Eight Circuit in *Stillians* adopted a mechanistic approach to Congressional intent. It determined that since there is a federal common law which presumes agency preclusion, that presumption

must stand under the ADEA unless clear contrary rebuttal language can be affirmatively discerned from the ADEA or its legislative history. 843 F.2d at 280-1. There are certain defects to this type of approach.

The *Stillians* approach stacks the deck before the issue at bar can be fairly addressed. If the sole question before this Court reduces to whether the ADEA, on its face or in its legislative history, states a clear rebuttal of the common law presumption of agency preclusion, that approach, involving little more than a glorified word hunt, leaves practically no room at all for this Court to consider the underlying merits of the issue on any other ground, including public policy, logic or common sense. In fact, to pose the question at bar *solely* in such terms narrows the inquiry in a way that prevents any meaningful analysis. Nothing in *Elliott* mandates posing the question in such restricted terms.

Moreover, the *Stillians* Court's fixation upon the common law presumption of agency preclusion ignores the fact that there are any number of other types of presumptions which if not rebutted could lead to contrary results: Since the ADEA is remedial legislation, there is a "presumption" that it should be liberally construed to favor the aggrieved employee. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 (1979), (Blackmun, J., concurring opinion). There is a "presumption" that, because the ADEA is relatively similar to Title VII, Congress would have wanted the question of agency preclusion to be resolved in the same manner for both statutes. If a grievant has *de novo* rights under Title VII, even in the face of an adverse fact-finding by the state agency or EEOC, it may be "presumed" that Congress would have intended that the ADEA confer the same common law *de novo* rights in the case of an adverse state agency determination. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) at 469, n. 7. Because of the shortening of the deferral

period in Section 14(b), (discussed *supra* in Point II[B]), there is a "presumption" that Congress intended to speed up access to the federal court, not to impose further impediments thereto. Finally, given its inclination to encourage the conciliation efforts of state agencies, Congress "presumably" did not want to deter grievants from utilizing the state agency's machinery by the threat of agency preclusion.

In sum, there are any number of presumptions which could apply at bar with the same force, but to the opposite effect, as the presumption of common law agency preclusion. The decision by the *Stillians* court to single out this one presumption, to the exclusion of all others, is simply too wooden an approach to provide a meaningful basis for proper judicial analysis.

POINT IV

PUBLIC POLICY CONSIDERATIONS POINT TOWARD AGENCY NON-PRECLUSION

The public policy considerations implicated in this matter provide several reasons for disfavoring agency preclusion in ADEA actions:

A. THE NEED TO BE CONSISTENT WITH THE MORE GRIEVANT-PROTECTIVE NATURE OF THE ADEA:

Agency preclusion denies the grievant many of the several benefits of an ADEA action which are not available under state law: A grievant who proceeds before DHR will be denied a right to jury trial at both the DHR investigative and public hearing levels; a right to jury trial is guaranteed in a private action under Section 7(c)(2) of the ADEA. A grievant may be denied the benefits of favorable ADEA case law relative to the nature of the proofs required (i.e., permitting age discrimination to be inferred under the "indirect"

method of proof in the situation where there is no direct or circumstantial evidence of age discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). A grievant will be denied the right to recover liquidated damages and attorney's fees available under ADEA but not necessarily available under state law. A grievant may not receive the full measure of other legal and equitable remedies available under the ADEA (e.g., front pay, prejudgment interest and continuing court supervision) which may or may not be available under state law.

B. THE NEED FOR PRESERVING UNIFORMITY IN THE LAW IN THIS AREA:

Even if the ADEA were not abundant in its statutory remedies, this Court has an overriding obligation to foster an internally consistent and uniform body of case law under the ADEA. Giving preclusive effect to judicially unreviewed state agency findings is inconsistent with, and runs counter to, several well-established principles promulgated by this Court applicable to ADEA and Title VII litigation:

1) Under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), a case arising under Title VII, this Court has held that judicially *reviewed* state agency findings are entitled to preclusive effect. This Court, in *Kremer*, also stated that "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such [*de novo* federal court] review, even if such a decision were to be afforded preclusive effect in a State's own courts." 456 U.S. at 470, n. 7. This language cannot be dismissed as mere *dictum* inapplicable to ADEA actions, as Petitioner would so argue (Pet.B. at 26). Moreover, a determination that *unreviewed* agency findings were entitled to the same

preclusive effect as *reviewed* findings would make the state court's review meaningless.

2) Under *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), a grievant is not permitted to bypass or ignore any applicable state agency filing requirement in order to bring suit under ADEA. This Court has made it clear, however, that no *additional burdens* on access to the federal remedy should be imposed. *Id.* at 762-3. Accordingly, this Court held that the state agency filing may be made untimely, and on a *pro forma* basis, without causing the grievant's federal claims to be dismissed. *Id.* Agency preclusion would turn *Oscar Mayer* on its head. It would deny access to federal court to any grievant who received an adverse state agency finding during the mandated period of deferral (clearly an additional burden).

Theoretically, an artful grievant may be free, depending on the time constraints imposed by Section 7(d) and by state law filing requirements, to circumvent state agency processing. *Id* at 763-4. For example, he could wait until after the state statute of limitations for filing had expired and then late-file his state charge before or even after his federal suit. Alternatively, a grievant who filed timely with the EEOC might be able to persuade that agency not to refer a copy of his charge over to the applicable state agency. Since such a grievant could, if so advised, effectively forego an available state remedy, while preserving his federal remedy, it would be unfair to penalize another grievant who, unwittingly or in good faith, has made a timely filing, only to find that the state agency has abruptly issued fact-findings against him. Moreover, recognizing that such tactics are not proper, but seeking nonetheless to discourage an employee from utilizing them, this Court has explained that no advantage could be gained: "Prior resort to the state remedy would not impair the availability of the federal [EEOC] remedy, for the two are supplementary, not mutually exclusive." *Id.* at 764. In light

of this Court's assurance that a grievant will not be put in jeopardy by making a state agency filing, agency preclusion cannot apply in the absence of judicial review.

3) Agency preclusion is wholly inconsistent with this Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), that findings of arbitrators in a Title VII context are not entitled to preclusive effect. The underlying rationale for this decision is that access to the federal remedy in such cases should not be limited by prior non-judicial adjudications. The same rationale for not giving preclusive effect to arbitration awards is equally applicable to not giving preclusive effect to state agency findings. The broad federal policy of allowing a grievant unfettered access to pursue a judicial remedy with respect to the federal anti-discrimination statutes should not be eroded by dubiously based exceptions. *Rosenfeld*, 769 F.2d at 239.

4) As previously stated, agency preclusion under ADEA is inconsistent with agency non-preclusion under Title VII, as mandated in *Elliott*. Many appellate courts have made it clear that, since the ADEA was substantially modelled after Title VII, these two statutes should be construed in the same fashion whenever possible. *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2nd Cir. 1989) ("for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Lorillard v. Pons*, 434 U.S. 575 at 584 (1978). A finding of agency preclusion would not only create non-uniformity in the anti-discrimination laws, it would so unsettle accepted precedents as to raise the spectre that other arcane distinctions might exist between ADEA and Title VII. Where there are no facial barriers, as at bar, to preserving uniformity in the application of the two statutes themselves, this Court should be reluctant to expand the instances of non-uniformity.

C. THE NEED TO UTILIZE THE STATE AGENCY'S RESOURCES AND PROCEDURES IN A PROPER FASHION:

There are still other policy reasons for not finding agency preclusion. Grievants who file with a state agency normally do so without the aid of counsel; often they are told that private counsel is not needed and they are assured that the state agency itself will fully protect their rights. If this Court finds state agency preclusion should apply, state agency processing will hereafter become a veritable trap for the unwary who do not know that their failure to take prompt steps to supersede the state agency action, i.e., by institution of a federal court suit, will forever bar their claims.

On the other hand, for those grievants who are sufficiently sophisticated or able to retain counsel, state agency processing will become dramatically altered if agency preclusion applies. Even at the investigative level, state agency processing will instantly become a much more complicated, costly and time-consuming drain on the state agency's resources than most state legislatures had contemplated. Considering the varying degrees of expertise and resources of most state agencies, it would seem preferable to retain this forum for early conciliation and mediation purposes, rather than to convert it into the main litigation arena.

Alternatively, counsel for certain employees may find that entrusting their clients' claims to the state agency's expertise is not worth the risk. Not wishing to face the possibility of an adverse determination, such counsel may seek to defer any substantive processing until a federal suit may be brought. Rather than devote any efforts before the state agency, some grievants will, in fact, be advised not to offer any cooperation for fear that this will constitute an invitation for the agency to proceed further and issue fact-findings which may be unfavorable to them. It is not unlikely that the same

grievants, fearful of an adverse determination, will also race to the federal courthouse on the 61st day following their state agency filing.

This proactive approach will effectively undermine even limited conciliation efforts attempted by the state agency. It would also frustrate one of the essential purposes of state agency deferral; i.e., to screen from the federal courts complaints that could be settled to the *satisfaction of the grievant* in less formal proceedings. *Oscar Mayer*, 441 U.S. 750 at 755-56. *See* also *Elliott*, 478 U.S. at 788 (Stevens, J., concurring in part and dissenting in part).

In sum, if state agency preclusion were to apply, the state agency would find itself in the unwelcome position of being either the main litigation battleground for some grievants, or else a minefield to be carefully eschewed by others. Both extremes defeat one of the essential purposes of state agency deferral, which is to resolve discrimination claims by conciliation and early settlement, to the satisfaction of the parties, before they become full-fledged federal court lawsuits.

CONCLUSION

For the reasons discussed herein, the Order of the U.S. Court of Appeals for the Second Circuit should be affirmed in all respects.

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